TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1914

No. [redacted] 120

JAMES H. DUFFY, APPELLANT,

vs.

WILLIAM CHARAK, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF JULES & FREDERIC COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

FILED FEBRUARY 27, 1915.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

No. 471.

JAMES H. DUFFY, APPELLANT,

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WILLIAM CHARAK, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF JULES & FREDERIC COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

INDEX.

	Original.	Print
Caption	*a*	1
Transcript from the district court of the United States for the district of Massachusetts	1	1
Court and title of case	1	1
Trustee's petition	1	1
Respondent's answer	5	4
Stipulation for sale	6	5
Referee's order	8	6
Certificate by referee to judge	8	6
Decree on certified question	11	8
Prayer for appeal	12	9
Assignment of errors	12	9
Opinion	13	10
Agreed facts	18	13
Bond to party on appeal	19	14

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	Original.	Print
Citation and acknowledgment of service thereof	20	15
Certificate of clerk of district court	21	15
lers of enlargement of time for docketing case, etc.	23	16
inion	25	17
nal decree	27	18
tition for appeal	29	19
signment of errors	31	19
der allowing appeal, &c	35	20
nd on appeal	37	20
ation and service	39	21
erk's certificate	41	22

United States Circuit Court of Appeals for the First Circuit,
October Term, 1911.

No. 970.

JAMES H. DUFFY, Respondent, Appellant,
v.
WILLIAM CHARAK, Trustee, Petitioner, Appellee.

n the Matter of JULES & FREDERIC COMPANY, Bankrupt.

l from the District Court of the United States for the District
Massachusetts, from Decree (Dodge, J.), November 10, 1911.

Transcript of Record.

the Appeal of James H. Duffy in the Above-entitled Case to
the Supreme Court of the United States.

S. Circuit Court of Appeals for the First Circuit. Filed in
's Office Apr. 1, 1912.

United States Circuit Court of Appeals for the First Circuit.
October Term, 1911.

No. 970.

JAMES H. DUFFY, Respondent, Appellant,
v.
WILLIAM CHARAK, Trustee, Petitioner, Appellee.

Transcript of Record of District Court.

[Filed in Circuit Court of Appeals April 1, 1912.]

the District Court of the United States for the District of
Massachusetts.

No. 14930. In Bankruptcy.

n the Matter of JULES & FREDERIC COMPANY, Bankrupt.

WILLIAM CHARAK, Trustee, Petitioner,
v.
JAMES H. DUFFY, Respondent.

Trustee's Petition.

[Filed August 26, 1909.]

ur petitioner respectfully shows:—
That at a court in bankruptcy held in said District on the
y-fourth day of August, 1909, he was duly appointed trustee

of the estate of the above named bankrupt, and has qualified as such by giving bond in accordance with said appointment.

2. That said bankrupt was adjudicated on the thirteenth day of July, 1909, on a creditors' petition filed by your petitioner on behalf of creditors against it in said District Court on the twenty-sixth day of May, 1909.

2 3. That on and prior to said twenty-sixth day of May, 1909, the said bankrupt was engaged in the business of hair dressing and millinery, and had a stock of goods and fixtures contained in a store numbered three hundred and eighty (380) on Boylston Street in Boston in said District.

4. That on about the twenty-fourth day of May, 1909, your petitioner, acting as counsel for one Irene B. Cox, a creditor of said bankrupt, caused the stock in trade and fixtures of the said bankrupt to be attached in an action at law, begun on said twenty-fourth day of May, 1909, in the Superior Court for Suffolk County, and caused a keeper to be placed in custody of the stock and fixtures of the said bankrupt.

5. That thereafter on or about the twenty-fifth day of May, 1909, the respondent, James H. Duffy, claimed to hold a mortgage on said stock and fixtures and possession under said mortgage, the mortgage being alleged in the sum of five thousand six hundred and seventy-five dollars ($5675), and dated the second day of March, 1909.

6. That your petitioner is informed and believes, and therefore avers, that the bankrupt and the said James H. Duffy did on or about the second day of March, 1909, enter into a scheme to give the said James H. Duffy a preference and did on or about said time execute a mortgage as above related, but that said mortgage was never recorded as is required under the provisions of Revised Laws of the Commonwealth of Massachusetts.

7. That your petitioner is informed and believes, and therefore avers, that said mortgage is invalid and void for lack of record and because it was intended to create a fraudulent preference within four months from the date of the filing of the petition against said bankrupt.

8. That your petitioner, acting for petitioning creditors before adjudication, in due season applied to the District Court in bankruptcy for and did obtain a restraining order, restraining the said Duffy from in any way disposing of the property claimed by said Duffy under the mortgage.

9. That thereupon your petitioner, acting for the petition-
3 ing and for intervening creditors, entered into a stipulation with the said Duffy, which is on file in this matter in this Honorable Court, substantially to the effect that the property of the bankrupt may be sold by said Duffy and that the rights of all parties interested shall remain unchanged by said sale, but shall exist in the funds realized therefrom in the same manner and in like proportion as they would exist in the property were it not sold, and that the proceeds of such sale when made shall be deposited in the State Street Trust Company, in the name of James H. Duffy, as trustee,

o await the final order of the court as to the rights of the parties herein, and that the said James H. Duffy shall act in conjunction vith and consult the judgment of your petitioner, representing he creditors, and Charles H. Gilmore, representing the bankrupt, n matters pertaining to the price at which said property shall be old and like details relating to the sale.

10. That thereafterwards in pursuance of said stipulation the njunction issued against said Duffy was dissolved, and your petiioner is informed and believes, and therefore avers, that the said Duffy sold and disposed of most of the property of the said bankupt, and retains possession and control of the remainder, as well s of the funds realized from the sale of said property.

11. That the said Duffy has not consulted with your petitioner nor obtained his consent in all matters pertaining to the price at vhich said property was sold, nor the like details relating to the ales.

12. That your petitioner has been refused and denied the opporunity to inspect the alleged mortgage which the said Duffy claims o hold on the property of the said bankrupt, and until long after vour petitioner was appointed trustee in this matter the said Duffy as not even furnished your petitioner with a purported copy of the aid mortgage.

13. That your petitioner does not know whether the said Duffy id or did not comply with the terms of the stipulation regarding he deposit of the funds realized from the sales of the said propvty of the bankrupt.

14. That your petitioner is informed and believes, and therefore avers, that the said Duffy is not a bona fide holder for value of the said alleged mortgage debt nor that the whole f said mortgage debt is justly due from said bankrupt.

15. That your petitioner is informed and believes, and therefore vers, that for so much as the said Duffy may be a bona fide creditor of the said bankrupt he is entitled to share in no greater proporion than any other creditors of the said bankrupt who are unsecured nd not entitled by law to priority.

16. And that both the bankrupt and the said Duffy by the said lleged mortgage intended to create a preference within four months f the date of the filing of the creditors' petition against said bankupt.

17. That your petitioner is informed and believes, and therefore vers, that the bankrupt intended to create a preference by said lleged mortgage, and that said Duffy had reasonable cause to elieve that it was intended thereby to give him a preference within our months of the date of the filing of the creditors' petition in this natter.

Wherefore your petitioner prays:

1. That the said James H. Duffy may be made a party to these roceedings, and may be summoned to appear herein and to answer o this petition.

2. That the said Duffy may be required to surrender to your

petitioner all moneys and properties belonging to the estate of said bankrupt now in his possession.

3. And for such other and further relief as to this Honorable Court may seem proper and as justice may require.

WILLIAM CHARAK, *Trustee.*

Subscribed and sworn to before me this twenty-fifth day of October, 1909.

JACOB L. WISEMAN,
Notary Public.

5 *Respondent's Answer.*

[Filed November 5, 1909.]

And now comes the respondent in the above-entitled action and for answer admits the allegations contained in paragraphs 1 and 2 of said petition.

This respondent neither admits nor denies the allegations contained in paragraphs 3 and 4 in said petition, but leaves the petitioner to prove the same in so far as they may be material.

As to the matters contained in paragraph 5 in said petition, the defendant admits that the Jules & Frederic Company executed a mortgage of their stock and fixtures to him on the second day of March, 1909, to secure notes amounting to five thousand six hundred and seventy-five dollars ($5,675.00), and that this respondent immediately took possession under said mortgage and retained said possession and that the attaching officer in the attachment referred to in paragraph 4 of petitioner's bill was given notice of said mortgage on the same day that he made the alleged attachment.

The respondent denies the averment made by the petitioner in paragraph 6 of his bill that the respondent entered into a scheme with said bankrupt to give this respondent a preference, and denies that the Revised Laws of the Commonwealth of Massachusetts required said mortgage to be recorded, said respondent having taken and kept possession under said mortgage.

As to the matters contained in paragraph 7, this respondent denies that this mortgage is invalid for lack of record and that it was intended to create a fraudulent preference.

As to the matters contained in paragraphs 8, 9 and 10 of said bill, the respondent admits that this court issued a temporary order restraining him from disposing of the property claimed by him under said mortgage and that thereafterward, for the benefit and convenience of all parties interested, a stipulation was entered into and filed in this court, a copy of which is hereto annexed.

As to the allegation contained in paragraph 11 of said petition, this respondent denies that he has not consulted with this petitioner or obtained his consent in all matters pertaining to the price
6 at which said property was sold, but on the contrary has in every instance consulted with said petitioner, but that this petitioner, regardless of his duty in the premises, has wilfully and

unnecessarily delayed and obstructed the carrying out of the letter and spirit of said stipulation.

As to the allegation in paragraph 12 in said bill, this respondent denies that he at any time refused or denied this petitioner the opportunity to inspect said mortgage, and further says that immediately upon the election of this petitioner as trustee of said bankrupt, this respondent voluntarily furnished him a copy of said mortgage.

Answering paragraph 13 of said bill, the respondent says that he has performed his full duty under said stipulation and is not responsible for the petitioner's lack of knowledge in that regard.

As to the allegations in the paragraphs 14 and 15 of said bill, this respondent denies that he is not a bona fide holder for value of said mortgage debt and that the whole of said mortgage debt is not justly due, and that he is entitled to a share of no greater proportion than unsecured creditors of said bankrupt.

This respondent denies the allegation in paragraph 16 of said bill that said mortgage was intended to create a preference, but says that said mortgage was given for a valid present consideration.

Answering paragraph 17 of said bill, the respondent denies that the bankrupt intended to create a preference by said mortgage and denies that he had reasonable cause to believe that it was intended thereby to give him a preference.

Wherefore the respondent prays that this bill may be dismissed and that he may be allowed his reasonable costs.

JAMES H. DUFFY,
By His Solicitor, DAVID J. O'CONNELL.

Stipulation.

Whereas it is deemed for the benefit of all parties interested that the stock in trade, furniture and fixtures in the store of the alleged bankrupt at Nos. 380 to 382 Boylston Street, Boston, Mass.,
7 be converted into cash, the said stock being perishable in its nature, and

Whereas James H. Duffy, the alleged mortgagee thereof, claiming permission as such, now has the custody of said property, it is hereby stipulated and agreed by the undersigned, being all the parties interested in the above-entitled action:

First. That the injunction of the court now in force restraining the alleged mortgagee, James H. Duffy, from disposing of the said property may be dissolved.

Second. That the said alleged mortgagee, James H. Duffy, be allowed to forthwith convert the said stock in trade, furniture and fixtures into cash, using absolute good faith in procuring the highest price possible consistent with an immediate sale and the existing circumstances, either by selling in the usual course of trade or in bulk to the highest bidder, it being understood that the rights of all parties interested shall remain unchanged by said sale or sales, but shall exist in the funds realized therefrom in the same manner

and in like proportion as they would exist in the property were it not sold.

Third. That the said James H. Duffy shall pay out of the moneys received from such sale or sales the necessary expenses of conducting the same or protecting the property, including labor, advertising and rent from this date (rent being at the rate of $317.50 per month, and to cease as soon as the premises are vacated), and deposit the balance realized in the State Street Trust Company, in the name of James H. Duffy, trustee, to await the final order of the court as to the rights of the parties therein.

Fourth. That the said James H. Duffy shall act in conjunction with and consult the judgment of William Charak, representing the creditors, and Charles H. Gilmore, representing the alleged bankrupt, in matters pertaining to the price at which said property shall be sold and like details relating to the sale.

WILLIAM CHARAK,
Attorney for the Petitioning and Intervening Creditors.

8 JAMES H. DUFFY, *Mortgagee.*

WILLIAM P. EVERTS,
Attorney for William A. Paine, Landlord and Creditor.

CHARLES H. GILMORE,
Attorney for Alleged Bankrupt.

Dated June 7, 1909.

Referee's Order.

This case came on to be heard, was argued by counsel and submitted on briefs, and after due consideration thereof, it is hereby ordered and decreed that the mortgage to said Duffy be and the same is hereby declared to be invalid, and that said Duffy be and he hereby is required to surrender to the petitioner all moneys and properties belonging to the estate of said bankrupt now in his possession, whether sold under stipulation of court or otherwise.

JAMES M. OLMSTEAD,
Referee in Bankruptcy.

Boston, August 5, 1911.

Certificate by Referee to Judge.

[Filed October 2, 1911.]

To the Honorable Frederic Dodge, Judge of said Court:

I, James M. Olmstead, one of the referees of said Court in Bankruptcy, do hereby certify that in the course of the proceedings in said cause before me the following question arose pertinent to the said proceedings, to wit:—

This was a petition to review a decree of the referee setting aside and declaring null and void a mortgage given by the debtor company to the respondent, James H. Duffy. The petition alleged that the mortgage constituted a fraudulent preference and was void for want of record or that no valid possession was taken in accordance

with the Revised Laws of Massachusetts, and was also invalid
9 as being given in violation of the so-called "Sales-in-Bulk Law." The respondent was made a party to these proceedings, duly appeared and filed an answer. The facts I find to be as follows:—

Mr. A. Jules Aylies and Mr. Frederic L. Carpenter, in September, 1907, formed a corporation known as the Jules & Frederic Company, for the purpose of doing a business of millinery and hairdressing in said Boston. Mr. Carpenter was chosen the president of the company, and Mr. Aylies its manager, treasurer and secretary. The concern subleased premises at 380 Boylston Street from Mr. Carpenter, upon which extensive repairs had been made, and for which repairs Mr. Carpenter procured a note from the company for $4,175. The business was begun early in the year 1908, but did not prove successful. In fact, as Mr. Aylies testified, they were losing money. It became, therefore, necessary, early in the year 1909 to take steps to procure either more capital or loans in order to carry it on. The respondent, who had acted as counsel for Mr. Carpenter and to whom the latter owed about four or five hundred dollars, was induced to make a loan of $1,500 to the company on March 2, 1909, which was secured by a mortgage in the sum of $5,675. This was done pursuant to a vote of the corporation passed on March 1, 1909, but which was not copied into the record book until May 23. Prior to this, in February, a statement had been given to Mr. Duffy showing the assets of the company to be in excess of liabilities, but this statement omitted an indebtedness of about $8,000 to Mr. Aylies for money advanced by him, and if this omission had been supplied I find that Mr. Duffy would have been made aware of the insolvent condition of the company at this time. Its existence, however, was known by Mr. Carpenter, who had solicited the loan from Mr. Duffy, and had informed him of the company's condition. Upon giving the mortgage on March 2, an attempt was made by Mr. Duffy and Mr. Carpenter to take possession, and resort was had to the device of making Miss Mazur, a book-keeper, the agent for the mortgagee. She testifies that she had no knowledge of a
10 mortgage, that she was told to take the key of the premises, but was ignorant of the meaning of the whole transaction.

The evidence shows that the business was conducted from March 2d until May 24th, when the attachment was made, in the same manner that it had always been, that Mr. Duffy paid no rent for the premises, and in fact Mr. Carpenter admitted that there was no ostensible change in the form of doing business after the mortgage. On the 24th of May a keeper was put in, and then Mr. Duffy sought to fortify his alleged possession by substituting a new agent or keeper. On the 26th of May the notice of foreclosure of this mortgage was recorded, and on the same day an involuntary petition in bankruptcy was filed, upon which the company was subsequently adjudicated.

Before the conclusion of the proceedings, the respondent waived all claim to the mortgage note of $4,175, which represented the obligation of the company for repairs and which had been given him

as security for the antecedent indebtedness of Mr. Carpenter to him, and which had been endorsed by Mr. Carpenter. To this extent the respondent seems to have admitted that he had received a preference. He insists, however, that his mortgage is valid to the extent of fifteen hundred dollars advanced by him as a present consideration, and also that his possession was a valid one under the laws of Massachusetts. I am, however, led to conclude that the possession of the respondent was merely colorable, and did not amount to an actual bona fide possession called for by the statute.

Section 70, *a* (4), (5).
Clark v. Williams, 190 Mass. 219.
Dempsey v. Gardner, 127 Mass. 381.
Waite-Robbins Motor Co., decided by the Honorable District Judge in this District.
In re McDonald, 21 Am. B. R. 358; S. C., 23 Am. B. R. 51; 173 Fed. Rep. 99.

I am also led to conclude that the attempt to include this whole business as security for the respondent amounted to a sale, and was a violation of Chapter 415 of the Acts of 1903 of this Com-
11 monwealth known as the "Sales-in-Bulk Act." Section 67, *e*, provides that all encumbrances, etc., by a debtor of his property within four months prior to the filing of the petition against him, etc., "which are null and void as against the creditors of such debtor by the laws of the State, Territory, or District, in which such property is situated, shall be deemed null and void under this act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt." Cf. McDonald, supra.

And the pleadings, briefs of learned counsel ably reviewing the testimony, and the evidence requested by counsel to be certified, are herewith submitted.

JAMES M. OLMSTEAD,
Referee in Bankruptcy.

Boston, September 26, 1911.

Decree on Certified Question.

At Boston, in said District, on the tenth day of November, A. D. 1911, upon the question certified to the court by the referee in said matter on the second day of October, A. D. 1911, now, therefore, after hearing arguments of David J. O'Connell, Esq., counsel for the mortgagee, and William Charak, Esq., trustee, and after due consideration of the same: It is hereby ordered and decreed that the order of the referee declaring void the mortgage given by the bankrupt to James H. Duffy be and it hereby is affirmed.

It is further ordered that the clerk send a copy of this order by mail to the referee.

Witness the Honorable Frederic Dodge, judge of said court, and the seal thereof, this tenth of November, A. D. 1911.

MARY E. PRENDERGAST,
Deputy Clerk.

12 *Prayer for Appeal.*

[Filed November 17, 1911.]

The above-named respondent, deeming himself aggrieved by the decree made and entered upon the above-named petition, whereby this Honorable Court affirmed the judgment of the referee allowing the trustee's claim, and declaring the respondent's mortgage invalid, hereby appeals to the United States Circuit Court of Appeals for the First Circuit. And for the reasons specified in the Assignment of Errors filed herewith, he prays that his appeal may be allowed and that a duly authenticated transcript of the record, proceedings and papers upon which said order was made may be sent to said United States Circuit Court of Appeals.

JAMES H. DUFFY,
Respondent.

November 17, 1911, appeal allowed.

FREDERIC DODGE,
U. S. District Judge.

Assignment of Errors.

[Filed November 17, 1911.]

And now comes James H. Duffy, the above-named respondent, after a decision of this court affirming the judgment and finding of the referee, and files the following assignment of errors upon which he will rely upon his appeal:

1. The court erred in affirming the ruling of the referee.
2. The court should have ruled that respondent's mortgage was valid to the amount of fifteen hundred dollars.
3. The court should have ruled that the respondent had a sufficient and valid possession under his mortgage when the bankruptcy petition herein was filed.
4. The alleged attachment of May 24, 1909, was dissolved by the bankruptcy proceedings, leaving the mortgage lien valid.
5. The said attachment was not preserved for the benefit of the bankrupt estate.
6. The said attachment was not a valid attachment.

JAMES H. DUFFY,
Respondent.

13 *Opinion of the District Court.*

October 30, 1911.

DODGE, *J.:*

Adjudication in this case was on July 13, 1909, under a creditors' petition filed May 26, 1909.

The chattel mortgage here in question was given March 2, 1909. It purported to secure the payment of $5,675 in all, $4,175 of which is now conceded to have been pre-existing indebtedness of the bankrupt to the mortgagee. That the remaining $1,500 represents an actual loan of that amount by the mortgagee to the bankrupt, made when the mortgage was given or afterward, and as a part of the consideration for it, is not in dispute under this petition for review.

The mortgage was never recorded. Whether it can be held good for $1,500 as against the trustee or not, depends upon the question whether the mortgaged property had been delivered to and retained by the mortgagee before the trustee's rights in the bankrupt's property accrued. Unless the property was delivered to and retained by the mortgagee, the mortgage has no validity against a person other than the parties to it. (Mass. Rev. Laws, chap. 198, sec. 1.) The trustee cannot be regarded as a "party" to it. Re Hurley, 185 F. R. 851, 854. Clark v. Williams, 190 Mass. 219, 223.

The mortgage purported to cover all the bankrupt's fixtures and stock in trade, consisting of millinery, millinery supplies, hair goods, shell goods, in its store Nos. 380 to 382 Boylston Street, Boston. It also recited an agreement between the parties that the bankrupt might dispose of the stock in trade in due and ordinary course of trade, provided that what should be so disposed of was to be replaced by goods of equal value, the mortgage to apply to such after-acquired goods.

The mortgagee was at the store when the mortgage was given. He contends that the mortgaged property was then delivered to him and since retained by him. The trustee denies that there was any such delivery or retention. A fuller and more specific finding of the facts bearing on this question than appears in the ref-
14 eree's certificate seems to me desirable. The entire evidence before the referee has been transmitted with his certificate. It relates, in great part, to questions not raised by the petition for review, but from it I find the facts now material as follows:—

(1) The bankrupt held a lease of the premises, which had some eight years to run. This it assigned to the mortgagee also, on March 2, 1909. The mortgagee, on the same date, executed a written agreement, which, after reciting the loan of $5,675 and the assignment of the lease as partial security therefor, provided for a reassignment of the lease by him upon repayment of the loan. It does not appear that he ever had or claimed possession and control of the leased premises under the lease thus assigned, except as below stated; and, as the referee has found, he never paid any rent.

(2) On March 2, 1909, when the mortgage, assignment of lease and agreement were executed, the mortgagee, then present in the store, walked through it with the bankrupt's representatives; the

fixtures and other property mortgaged were indicated, and he stated that he took possession of them.

(3) It was at the same time agreed between him and the bankrupt's representatives that Minnie Mazur, then employed in the store by the bankrupt as stenographer, should be employed as the mortgagee's agent and keeper. He was told that she had the keys, and opened and closed the store at morning and night. He asked her if she would act as agent, the bankrupt's representatives told her it was all right, and she agreed. He gave her some keys, telling her "she was supposed to hold the keys"; she put them in her pocketbook, and thereafter retained them. The mortgagee claims that he explained to her that a mortgage on the property had been given, and she was to act as agent for the mortgagee. This she denies; and I do not think it proved that she fully understood at the time that there was a mortgage, or that she was to act as keeper.

(4) On March 13 the mortgagee came to the store with a paper, previously prepared by him, and got Miss Mazur to sign it. The paper, marked "Exhibit 7", is in evidence. It purports to acknowledge her receipt from him of the fixtures and stock in trade described in the mortgage, and to be an agreement on her part to hold them for the mortgagee, and to surrender them to him or his *his* agents, on demand, without expense or charge to him for storage or keeping. This she signed without reading it, but with the knowledge and consent of the bankrupt's representatives. I do not think it proved that she knew when she signed it that the mortgage had been given, and that she was to be regarded as in possession of the store or its contents. She was in the store daily from and after March 2. The keys given her she kept, but did not use.

(5) Between March 2 and May 24 the store remained open to the public for business as before March 2. The bankrupt continued to conduct its business there as before, without ostensible change. It was a retail business, in the course of which goods from the stock in trade referred to were sold, from day to day, and new goods of a like kind added to them without separation, as had been done before March 2. The bankrupt's employees, through whom the business was done, remained the same, and continued in the bankrupt's employ as before. No more actual control over the business, the fixtures and stock in trade, or the proceeds of sale therefrom, or the payment for new goods added, was exercised by the mortgagee or by Miss Mazur after March 2 than before.

(6) On May 24, in a suit brought against the bankrupt in the Massachusetts courts, the stock in trade and fixtures then in the store were attached and a keeper put in charge of them by the deputy sheriff making the attachment. The mortgagee thereupon, on the same day, went to the store with a man having no connection with the bankrupt or its business, informed Miss Mazur that he was to replace her as agent and keeper, and left him in the store. On the following day the mortgagee notified the deputy sheriff in writing that all the fixtures and chattels in the store were mortgaged to him, that he had taken possesion of them before the attachment, and that his possession had since continued uninterrupted. After the attachment the store was closed and no further business done. The person

substituted as above for Miss Mazur by the mortgagee and the sheriff"s keeper remained together in the store until May 26.

16 (7) On May 25 the mortgagee served notice on the bankrupt that he intended to foreclose his mortgage for breach of condition. The notice recited that the mortgaged property was in his possession. That notice was recorded on May 26, at eleven minutes past eleven a. m.

(8) On May 26, at 9.20 a. m., the creditors' petition in this case was filed. The deputy sheriff thereupon withdrew his keeper. The mortgagee's representative above mentioned remained in the store until the mortgaged property was sold as stated below.

(9) On May 27, 1909, on application by the petitioning creditors, this court enjoined the mortgagee from disposing of any of the property belonging to the estate until a further order of the court. On June 9, 1909, the petitioning creditors and the mortgagee filed a stipulation in the case whereby, after reciting that the mortgagee, claiming possession as such, had custody of the property and that all parties interested would be benefited by its conversion into cash because of its perishable nature, they agreed that the above injunction should be vacated, the property converted into cash forthwith, without prejudice to the rights of either party, and that the proceeds, less the expenses of selling and protecting the property, should be deposited by the mortgagee, in his name as trustee, subject to the court's final order upon the rights of the respective parties therein. The property was thereafter sold and the proceeds deposited accordingly.

From the facts as above found, I am unable to conclude that there was such delivery and retention by the mortgagee as is necessary, under the Massachusetts Statute above cited, to make such a mortgage valid without record as against others than the parties. The parties went through the form of making a delivery of so much of the stock in trade as was in the store on March 2, but, as in Moors v. Reading, 167 Mass. 322, the arrangements they made on that day regarding its custody were with the obvious purpose, or at any rate with the effect, of enabling the mortgagor to carry on its business, in the usual manner, without exciting suspicion that its goods had been transferred. None of the goods were articles of great

17 bulk and weight, nor were they in a place access to which could be supposed under the control of that employee of the mortgagor whom the mortgagee undertook to make his agent for the purpose of retaining possession, as in Wright v. Tetlow, 99 Mass. 397, even if it be asumed that Miss Mazur distinctly understood that she was to hold possession of them under the mortgage and agreed to do so. There was no attempt to keep the goods originally mortgaged distinct from those acquired after March 2, and no subsequent delivery of any of those after acquired which were mingled indiscriminately with those in the store on March 2. To hold such possession as Miss Mazur can at best be held to have exercised a retention of possession by the mortgagee, would be, as was said in Moors v. Reading above cited (p. 326), to enable parties to practice the very fraud which the statute as to unrecorded mortgages of personal property was intended to prevent.

The mortgagee could take no possession of the goods while the deputy sheriff had possession of them under the attachment made March 24, whether or not the suit in which the attachment was made was really for the benefit of Aylies, treasurer of the bankrupt company, and whatever his relations to or previous dealings with the mortgagee and the president of the bankrupt company.

The deputy sheriff's possession while it lasted was exclusive, and it continued until the filing of the petition in bankruptcy under which there has been adjudication. I must hold that no possession taken after the filing of the petition can avail the mortgagee. State Bank v. Cox, 143 F. R. 91, 93. Crutchet v. Red Rover Co., 155 F. R. 486. Clay v. Waters, 178 F. R. 388, 394.

The referee was of opinion that the mortgage was void under the "Sales-in-Bulk Act" of Massachusetts. Acts 1903, chap. 415. I am not prepared to agree with this opinion, in view of Wasserman v. McDonnell, 190 Mass. 326. But for the other reasons above stated I must hold the mortgage invalid as against the trustee. The referee's order is therefore approved and affirmed.

18 *Agreed Facts.*

[Filed March 23, 1912.]

For the purpose of shortening the record it is agreed that the findings of fact disclosed by the report of the referee to the District Judge on the petition for a review of the final decree, and the findings of fact disclosed by the opinion of the District Judge thereon filed October 30, 1911, shall be deemed to be the facts which the evidence if reported would disclose so far as they may be material in this case. That in addition thereto it is agreed that if the evidence had been reported it would disclose the following facts:—

1. That the respondent and his counsel agreed that the respondent's books called for by the petitioner were not produced and if produced would have a tendency to embarrass the respondent, and that thereupon it was agreed that the petitioner may argue and the court may draw any legitimate inferences against the respondent for his failure to produce his books under the circumstances.

2. That the indebtedness of the bankrupt concern for goods purchased on credit was approximately thirty-five hundred dollars ($3500), a large part of which was contracted by the bankrupt during the time covered by the respondent's alleged possession and the date of the bankruptcy.

3. That said purchases on credit were made by the bankrupt, neither the bankrupt nor the respondent in any way disclosing to the creditors the fact of the unrecorded mortgage to the respondent or that the respondent was or claimed to be in possession of the bankrupt's stock and fixtures under his alleged mortgage.

4. That prior to the filing of the creditors' petition the respondent had done nothing (except as appears in the sixth paragraph of the findings contained in the opinion of the District Judge) to apprise the existing or prospective creditors of the bankrupt of his alleged possession of the stock and fixtures of the bankrupt under his alleged unrecorded mortgage.

5. That so far as any compliance might be required under Chapter 415 of the Acts of Massachusetts for the year 1903, regu-
19 lating the sale of merchandise in bulk, the respondent admits that there was no compliance with said statute.

6. That the petitioner has not made any specific motion and the court has made no specific order, to preserve the lien of attachment mentioned in the certificate of referee and the opinion of the District Judge, other than that on the day the herein mentioned creditors' bankruptcy petition was filed the petitioner herein, as the attorney for the petitioning creditors, including the attaching creditor, petitioned for the appointment of a receiver. The court refused to appoint a receiver, but granted an injunction restraining the respondent from disposing of any of the property belonging to the estate of Jules & Frederic Company, alleged bankrupts, until the further order of the court.

7. That the respondent herein, at the time of the execution of the mortgage in dispute, received as further security for his loan a pledge of four hundred (400) shares of stock of the bankrupt company owned by the president of the company, Mr. Carpenter, and the treasurer of the company, Mr. Aylies, amounting to all but two shares of the stock issued and outstanding, and said respondent retained possession of said stock by said pledge until and after the filing of the creditors' petition and of these proceedings.

WILLIAM CHARAK,
Petitioner, pro se.
JAMES H. DUFFY, *Respondent.*

Bond to Party on Appeal.

[Filed November 17, 1911.]

Know all men by these presents, that we, James H. Duffy, of Lynn, in the County of Essex and Commonwealth of Massachusetts, as principal, and Equitable Surety Company, a corporation duly organized and established by law and having a usual place of business in Boston in the County of Suffolk as surety, are held and firmly bound unto William Charak of said Boston, as he is trustee in bankruptcy of the Jules & Frederick Company in the full and just sum of two hundred and fifty dollars ($250) to be paid to the said William Charak, trustee as aforesaid, his certain attor-
20 ney, successors or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, and successors, jointly and severally, by these presents. Sealed with our seals and dated this seventeenth day of November in the year of our Lord one thousand nine hundred and eleven.

Whereas, lately at a District Court of the United States for the District of Massachusetts in a suit in bankruptcy depending in said court between the said William Charak, trustee as aforesaid, and the said James H. Duffy, a decree was entered against the said James H. Duffy, and the said James H. Duffy having obtained an appeal to remove said cause to the United States Circuit Court of

ppeals for the First Circuit, to reverse the decree in the aforesaid uit, and a citation directed to the said William Charak, trustee as foresaid, citing and admonishing him to be and appear in the said Jnited States Circuit Court of Appeals for the First Circuit, in the ity of Boston, Massachusetts, on the sixteenth day of December, . D. 1911.

Now, the condition of the above obligation is such, that if the aid James H. Duffy shall prosecute his appeal to effect, and answer ll damages and costs if he fail to make his appeal good, then the bove obligation to be void; else to remain in full force and virtue.

JAMES H. DUFFY [SEAL.]
[SEAL.] EQUITABLE SURETY COMPANY,
By A. A. DORITY, *Attorney in Fact.*

Sealed and delivered in presence of
—— ——.

Approved:
FREDERIC DODGE,
U. S. District Judge.

Citation on Appeal.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to William Charak, as He Is Trustee in Bankruptcy of the Estate of Jules & Frederic Company, Greeting:

You are hereby cited and admonished to be and appear in the Jnited States Circuit Court of Appeals for the First Circuit in the ity of Boston, Massachusetts, on the sixteenth day of December ext, pursuant to an appeal duly obtained from a decree of the District Court of the United States for the District of Massachusetts, herein James H. Duffy is appellant and you are appellee, to show cause, if any there be, why the said decree, entered against 21 the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Frederic Dodge, Judge of the District Court of the United States for the District of Massachusetts, this eventeenth day of November, in the year of our Lord one thousand ine hundred and eleven.

FREDERIC DODGE,
U. S. District Judge.

Acknowledgment of Service on Citation.

NOVEMBER 20, 1911.

Due and sufficient service of the within citation is hereby accepted.
WILLIAM CHARAK, *Trustee.*

Clerk's Certificate.

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, Charles K. Darling, Clerk of the District Court of the United States, for the District of Massachusetts, certify that the foregoing are true copies of the following papers on file in the clerk's office of said court in the cause in bankruptcy, No. 14,930, Jules & Frederic Company, Bankrupt:

Trustee's Petition against James H. Duffy,
Answer to said Petition,
Referee's Order on said Petition,
Certificate by Referee to Judge,
Decree on Certified Question,
Prayer for Appeal,
Assignment of Errors,
Opinion of the District Court,
Agreed Facts,
Bond on Appeal,

and also the original Citation issued upon the appeal of James H. Duffy, with the acceptance of service thereof.

22 And I further certify that the Petition for Adjudication in said matter was filed on the twenty-sixth day of May, A. D. 1909.

And I further certify that the Adjudication of Bankruptcy in said matter was made on the thirtieth day of July, A. D. 1909.

In testimony whereof, I hereunto set my hand, and affix the seal of said court, at Boston, in said District, this twenty-ninth day of March, A. D. 1912.

[SEAL.] CHARLES K. DARLING, *Clerk.*

23 United States Circuit Court of Appeals for the First Circuit, October Term, 1911.

No. 970.

JAMES H. DUFFY, Respondent, Appellant,
v.
WILLIAM CHARAK, Petitioner, Appellee.

Order of Enlargement of Time for Docketing Case and Filing Record.

DECEMBER 16, 1912.

For good cause shown, it is ordered that the time for docketing this case and filing the record thereof with the clerk of this court be enlarged to and including Saturday, December 30, 1911.

FREDERIC DODGE,
District Judge.

Order of Enlargement of Time for Docketing Case and Filing Record.

DECEMBER 27, 1911.

For good cause shown, it is ordered that the time for docketing this case and filing the record thereof with the clerk of this court be enlarged to and including Thursday, February 1, 1912.

FREDERIC DODGE,
District Judge.

24 *Order of Enlargement of Time for Docketing Case and Filing Record.*

JANUARY 31, 1912.

For good cause shown, it is ordered that the time for docketing this case and filing the record thereof with the clerk of this court be enlarged to and including Friday, March 1, 1912.

FREDERIC DODGE,
District Judge.

Order of Enlargement of Time for Docketing Case and Filing Record.

FEBRUARY 29, 1912.

For good cause shown, it is ordered that the time for docketing this case and filing the record thereof with the clerk of this court be enlarged to and including Monday, April 1, 1912.

FREDERIC DODGE,
District Judge.

25 United States Circuit Court of Appeals for the First Circuit, October Term, 1912.

No. 970.

JAMES H. DUFFY, Respondent, Appellant,
v.
WILLIAM CHARAK, Trustee, Petitioner, Appellee.

No. 982 (Original).

JAMES H. DUFFY, Petitioner.

In the Matter of JULES & FREDERIC COMPANY, Bankrupt.

Before Colt, Putnam, and Brown, JJ.

Opinion of the Court.

NOVEMBER 26, 1912.

COLT, *J.:*

We do not think it necessary to add anything in this case to the exhaustive opinion of the court below, which is reported, under the title of In re Jules & Frederic Co., in 193 Fed. Rep. 533.

It is stipulated by counsel that the findings of fact disclosed in that opinion shall be accepted on this appeal. Assuming, therefore, the truth of these findings, we fully concur in the conclusion of the District Court that the mortgaged property was never "delivered to and retained by the mortgagee," as provided by Mass. Revised Laws, Chap. 198, sec. 1. To hold that the possession of Miss Mazur, a clerk in the employ of the mortgagor, was a compliance with the statute, would be, as the court below said, "to enable
26 the parties to practice the very fraud which the statute as to unrecorded mortgages of personal property was intended to prevent."

As to the subsequent possession of the property by the deputy sheriff on a writ of attachment, it is clear that his possession was exclusive under the authorities as applied to the facts of this case. It might have been otherwise if there had been an actual or symbolical delivery of the property subject to the attachment in which both the mortgagee and the mortgagor took part. In the absence, however, of any such delivery no title would pass to the mortgagee under the Massachusetts decisions. Dempsey v. Gardner, 127 Mass. 381, 382; Fettyplace v. Dutch, 13 Pick. 388, 392; Benjamin on Sales, 7th Ed., page 725.

We therefore fully concur with the ruling of the District Court that "the deputy sheriff's possession while it lasted was exclusive, and that it continued until the filing of the petition in bankruptcy under which there has been adjudication."

In No. 970, Duffy v. Charak, Trustee, the decree of the District Court is affirmed, and the appellee recovers his costs of appeal.

In No. 982, Duffy, Petitioner, let there be a decree dismissing the petition with costs to the respondent.

27 & 28 United States Circuit Court of Appeals for the First Circuit, October Term, 1912.

No. 970.

JAMES H. DUFFY, Respondent, Appellant,
v.
WILLIAM CHARAK, Trustee, Petitioner, Appellee.

Final Decree.

November 26, 1912.

This cause came on to be heard October 10, 1912, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

On consideration whereof, It is now, to wit, November 26, 1912, here ordered, adjudged and decreed as follows: The decree of the District Court is affirmed, and the appellee recovers his costs of appeal.

By the Court,

FRANCIS M. FOGARTY, *Clerk.*

29 & 30 United States Circuit Court of Appeals for the First Circuit.

No. 970.

JAMES H. DUFFY, Respondent, Appellant,
v.
WILLIAM CHARAK, Trustee, Petitioner, Appellee.

Petition for Appeal.

(Filed January 22, 1913.)

The above named respondent, James H. Duffy, conceiving himself aggrieved by the decree made and entered herein on or about November 26, 1912, affirming the decree of the District Court, and ordering that the appellee recover his costs of appeal, doth hereby appeal from such decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors which he has filed herewith, and prays that this appeal may be allowed and that a duly authenticated transcript of the record, proceedings and papers on which said decree was made may be sent to the Supreme Court of the United States.

JAMES H. DUFFY, *Respondent.*

Appeal allowed.

LE BARON B. COLT,
Senior Circuit Judge.

31 & 32 United States Circuit Court of Appeals for the First Circuit.

No. 970.

JAMES H. DUFFY, Respondent, Appellant.
v.
WILLIAM CHARAK, Trustee, Petitioner, Appellee.

Assignment of Errors.

(Filed January 22, 1913.)

The above named respondent, James H. Duffy, says that in the records and proceedings of the said Circuit Court of Appeals for the First Circuit in the above entitled matter and in the final order or decree made and entered therein on November 26, 1912, there is manifest error, and for causes therefor the said James H. Duffy assigns that the said court erred in the following:

1. In affirming the order and decree of the District Court.

2. In not ruling that said respondent's mortgage was valid to the amount of fifteen hundred dollars.

3. In not ruling and finding that the respondent had a sufficient and valid possession under his mortgage when the bankruptcy petition against Jules & Frederick Company was filed.

33 & 34 4. In not ruling that the respondent had a sufficient and valid possession under his mortgagee as against everyone except the attaching creditor referred to in the records.

5. In not ruling and finding that the attachment of May 24, 1909, was dissolved by the bankruptcy proceedings, leaving the mortgage lien valid to the amount of fifteen hundred dollars.

6. In not ruling and finding that the lien of attachment of May 24, 1909, was not preserved for the benefit of the bankrupt estate of Jules & Fredericks Company.

7. That whereas the said attachment of May 24, 1909, was dissolved by the filing of the bankruptcy petition against the Jules & Frederick Company, the said court should have found the respondent's mortgage lien then became valid to the extent of fifteen hundred dollars.

8. In not ruling that the possession of the mortgaged goods taken by the respondent on May 24, 1909, was a valid possession as against the trustee in bankruptcy of the Jules & Frederick Company.

JAMES H. DUFFY, *Respondent.*

35 & 36 United States Circuit Court of Appeals for the First Circuit, October Term, 1912.

No. 970.

JAMES H. DUFFY, Respondent, Appellant,
v.
WILLIAM CHARAK, Trustee, Petitioner, Appellee.

Order of Court.

January 22, 1913.

Upon the filing of the appellant's petition for appeal to the Supreme Court of the United States, It is ordered that citation issue when a bond, with sureties approved by the appellee, has been filed by the appellant.

By the Court,

FRANCIS M. FOGARTY, *Clerk.*

37 & 38 *Bond on Appeal.*

(Filed January 30, 1913.)

Know all men by these presents, that we, James H. Duffy, of Lynn, in the County of Essex and Commonwealth of Massachusetts, as principal, and Massachusetts Bonding and Insurance Company,

a corporation duly organized and established by law and having a usual place of business in Boston in the County of Suffolk as surety, are held and firmly bound unto William Charak of said Boston, as he is trustee in bankruptcy of the Jules & Frederick Company in the full and just sum of two hundred and fifty dollars ($250) to be paid to the said William Charak, trustee as aforesaid, his certain attorney, successors or assigns; to which payment, well and truly to be made we bind ourselves, our heirs, executors and administrators, and successors jointly and severally, by these presents. Sealed with our seals and dated this twenty-second day of January, in the year of our Lord one thousand nine hundred and thirteen.

Whereas, lately in the United States Circuit Court of Appeals for the First Circuit in a suit depending in said court between the said William Charak, trustee as aforesaid, and the said James H. Duffy, a decree was entered against the said James H. Duffy, and the said James H. Duffy having obtained an appeal to remove said cause to the Supreme Court of the United States, to reverse the decree in the aforesaid suit, and a citation directed to the said William Charak, trustee as aforesaid, citing and admonishing him to be and appear in the said United States Supreme Court.

Now, the condition of the above obligation is such, that if the said James H. Duffy shall prosecute his appeal to effect, and answer all damages and costs if he fails to make his appeal good, then the above obligation to be void; else to remain in full force and virtue.

JAMES H. DUFFY. [SEAL.]
MASSACHUSETTS BONDING AND INSURANCE COMPANY, [SEAL.]
By SAMUEL PERRY, *Vice-President.*

Attest:
GEO. W. BERRY, *Assistant Secretary.*

Jan. 29, 1913.
This bond and sureties approved.
WILLIAM CHARAK,
Appellee, pro se.

39 *Citation on Appeal.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to William Charak, as he is trustee in bankruptcy of the estate of Jules & Frederic Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, on the* twenty-seventh day of February next, pursuant to an Appeal duly obtained from a decree of the† United States Circuit Court of Appeals for the First Circuit, wherein James H. Duffy is appellant and you are appellee, to show cause, if any there be, why the said decree, entered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Le Baron B. Colt, Senior Circuit Judge and a Judge of the United States Circuit Court of Appeals for the First Circuit this thirtieth day of January, in the year of our Lord one thousand nine hundred and thirteen.

LE BARON B. COLT,
Senior Circuit Judge.

* Not exceeding 30 days from the day of signing.
† Name of Court in which the Decree is entered.

40 Due and sufficient service of the within citation is hereby accepted.

WM. CHARAK,
Trustee, Appellee, pro se.

41 United States Circuit Court of Appeals for the First Circuit, October Term, 1912.

No. 970.

JAMES H. DUFFY, Respondent, Appellant,
v.
WILLIAM CHARAK, Trustee, Petitioner, Appellee.

Clerk's Certificate.

I, Francis M. Fogarty, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the foregoing is a true copy of the record and all proceedings of said Circuit Court of Appeals in the cause entitled, No. 970, James H. Duffy, Respondent, Appellant, v. William Charak, Trustee, Petitioner, Appellee, in said Circuit Court of Appeals determined, the Petition for Appeal, the Assignment of Errors, the Bond on Appeal and also the original Citation issued upon the appeal of James H. Duffy, Appellant, in said cause with acknowledgment of service thereon.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit the twenty-fourth day of February, A. D. 1913.

[Seal United States Circuit Court of Appeals, First Circuit.]

FRANCIS M. FOGARTY, *Clerk.*

Endorsed on cover: File No. 23,567. U. S. Circuit Court Appeals, 1st Circuit. Term No. 471. James H. Duffy, appellant, vs. William Charak, trustee in bankruptcy of the estate of Jules & Frederic Company. Filed February 27th, 1913. File No. 23,567.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 471.

JAMES H. DUFFY, APPELLANT,
v.
WILLIAM CHARAK, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF JULES FREDERIC COMPANY.

BRIEF OF JAMES H. DUFFY, APPELLANT.

STATEMENT.

(*a*) PLEADINGS AND ISSUE.

This is an appeal from a decree of the Circuit Court of Appeals for the First Circuit. The case was instituted by the trustee in bankruptcy of the Jules and Frederic Company by a petition in the form of a bill in equity filed with a referee in bankruptcy. No objection to the jurisdiction has been raised and the case is treated as properly instituted.

The material issue in this case is raised by the first two lines of the trustee's petition (page 2 of record) wherein it states: "that said mortgage is invalid and void for lack of record". (See also page 10 of record, near top of page.)

(*b*) QUESTIONS INVOLVED.

As will hereinafter appear, a chattel mortgage under Massachusetts laws may be a valid transaction without the mortgage being recorded, and the contention of the

appellant is that the mortgage here in question is one that is valid against the trustee in bankruptcy of the mortgagor. The facts are, in substance: —

On March 2, 1909, the bankrupt duly executed to the appellant a chattel mortgage to secure a debt of $5675. The present consideration given for the mortgage was $1500 and all of the principal sum named in said mortgage above $1500 is waived. The mortgage covered all the bankrupt's fixtures and stock in trade in its retail store on Boylston Street. It recited that bankrupt might dispose of the stock in trade in due and ordinary course of trade, provided that what should be disposed of should be replaced by goods of equal value, the mortgage to apply to such after acquired goods. On said March 2, 1909, as partial security for the loan, the bankrupt assigned to the appellant the bankrupt's lease of the said Boylston Street store. This lease had about eight years to run. By a contemporaneous written agreement it was to be reassigned to the bankrupt upon repayment of the loan.

On March 2 the appellant took possession of the goods covered by the mortgage. On the same date he agreed with the bankrupt that the bankrupt's stenographer, Miss Mazur, should act as his agent and keeper. The appellant gave this agent the keys of the store, and she thereafter retained them. She agreed to act as his agent. On March 13 this agent signed a paper acknowledging receipt from appellant of the goods described in the mortgage, and stating that she agreed to hold them for the mortgagee and to surrender them to mortgagee or his agents on demand, without expense or charge for storage or keeping. She was in the store every day.

On May 24, 1909, an attachment was made of the goods covered by the mortgage in suit against the bankrupt. The deputy sheriff who made the attachment placed a keeper in the store where the goods were.

Immediately thereafter, on the same day that the attachment was made, the appellant brought a man to the store who had no connection of any kind with the bankrupt, and installed him there as agent or keeper for the appellant. The store was then closed and no further business of any kind done. These two keepers, namely, the deputy sheriff's keeper and the appellant's keeper, were the only persons left in the locked up store between May 24 and May 26, on which latter date the bankruptcy petition in the case was filed. The deputy sheriff did not remove the attached goods from the store. The appellant had exclusive control of the goods after the petition in bankruptcy was filed, the sheriff's keeper being removed at that time. The appellant also had control and possession of the goods from the time he placed his agent in the store on May 24, except for such lien or possession as the sheriff had by his keeper's presence in the store. On May 25 the appellant notified the attaching officer in writing of his possession as mortgagee. On same day a notice of intention to foreclose was served on the bankrupt and duly recorded on the following date. On May 27 the appellant was enjoined from removing goods from the store. Being in possession he later sold the goods under a stipulation filed June 9 which removed this injunction, and he holds the proceeds of such sale.

The sequence of events may be tabulated for convenient reference as follows:—

March 2. Mortgage executed and possession taken.

May 2 to May 24. Miss Mazur on the premises.

May 24. Attachment by sheriff and sheriff's keeper entered.

May 24. Mortgagee entered with second keeper.

May 25. Written notice to sheriff. Notice of foreclosure served on bankrupt.

May 26. Bankruptcy petition filed. Sheriff's keeper removed.

June 9. Stipulation providing for sale.

No petition filed or order entered that the lien of attachment be preserved for the benefit of the bankrupt estate.

STATEMENT OF ERRORS RELIED UPON.

(1) The court erred in affirming the ruling of the referee.

(2) The court should have ruled that appellant's mortgage was valid to the amount of $1500.

(3) The court should have ruled that the appellant had a sufficient and valid possession under his mortgage when the bankruptcy petition herein was filed.

(4) The alleged attachment of May 24, 1909, was dissolved by the bankruptcy proceedings.

(5) The said attachment was not preserved for the benefit of the bankrupt estate.

ARGUMENT.

1. STATUS OF ATTACHED PERSONAL PROPERTY.

An attaching officer has only a special property in attached chattels; the general property is not changed.

Grant v. *Lyman*, 4 Metcalf, 470, at page 476.

The attachment would not prevent the debtor from conveying, mortgaging or assigning the property, subject to the attachment.

Grant v. *Lyman, supra*, at page 477.

In *Grant* v. *Lyman, supra*, personalty was attached in November and December, 1838; in January, 1840, the owner of the goods applied for the benefit of the insolvent Act of 1838; between the date of the attachment and the date of the insolvency (page 472 of cited case) the owner

of the goods mortgaged them. The case discusses the effect of mortgages of goods after attachment and the rights of assignees of insolvency in said goods.

See also *Fettyplace* v. *Dutch*, 13 Pickering, 388.

2. The Mortgage Lien.

The mortgage of March 2, 1909, having been given for a present valid consideration of $1500, was valid between the parties for this amount. It was good against all parties if the property was delivered to and retained by the mortgagee.

Massachusetts Revised Laws, Chapter 198, Section 1: —

> "Mortgages of personal property shall, within fifteen days from the date written in the mortgage be recorded. . . . Unless the property mortgaged has been delivered to and retained by the mortgagee, the mortgage shall not be valid against a person other than the parties thereto until it has been so recorded; and a record made subsequently to the time limited shall be void."

3. The Taking of Possession on May 24 a Delivery.

Even if what the appellant and Miss Mazur did between March 2 and May 24 be deemed less than as adequate retention of possession, the appellant contends that from the time of the entry of the second agent or keeper down to the and beyond the filing of the bankruptcy petition, there was a sufficient delivery and retention of possession. No further formal "delivery" was needed, and the mere taking of possession under the authority given by the mortgage itself was equivalent to a delivery. The acquisition of possession on May 24 gave a title good against everyone who had not acquired a prior lien.

A possession taken under the mortgage satisfied the statutory requirement of delivery.

Tatman v. *Humphrey,* 184 Mass. 361.
Humphrey v. *Tatman,* 198 U.S. 91.
Blanchard v. *Cooke,* 144 Mass. 207, at page 226 *et seq.*
Bennett v. *Bailey,* 150 Mass. 257.
Coggan v. *Ward,* 215 Mass. 13.

Where a mortgagee having by virtue of his mortgage a right of possession takes possession, the property has been delivered to him within the meaning of the statute.

Keepers v. *Fleitman,* 213 Mass. 210.

Actual delivery was not necessary. Even if the actual delivery on March 2 be ignored, a symbolical delivery on May 24 was sufficient notice of the existence of the mortgage and the appellant's claim thereunder was sufficient, and such notice was given on May 24 by the placing of the appellant's keeper on the premises and on May 25 by a written notice.

Clark v. *Williams,* 190 Mass. at page 222.
Mann v. *Huston,* 1 Gray, 250.
Whitaker v. *Sumner,* 20 Pick. 399, at page 405.
Appleton v. *Bancroft,* 10 Metcalf, 231.

4. Possession of Sheriff's Keeper Constituted a Lien Only.

The sheriff merely placed a keeper in the store. He did not remove goods. This constituted only a lien on the goods. It did not change the title to the property. It only held the property provisionally for a charge.

Coverdale v. *Aldrich,* 19 Pickering, at page 394.

The owner was free to sell or mortgage.

Parsons v. *Merrill,* 5 Metcalf, 356.
Whipple v. *Thayer,* 16 Pick. 25.

First Ward National Bank v. *Thomas*, 125 Mass. 278.
Horne v. *Briggs*, 98 Mass. 510.

5. The Effect of the Two Keepers.

The sheriff simply had a lien, and the entry of the appellant's keeper on May 24 vested in the appellant all other interest in the property which the bankrupt had.

The sheriff's keeper held under his lien and the mortgagee's keeper held under his lien. The possession of a sheriff's keeper was not as a matter of law exclusive. The District Court ruled as a matter of law to the contrary. (Record, page 13). On same page the District Court ruled as a matter of law that "the mortgagee could take no possession of the goods while the deputy sheriff had possession of them under the attachment made March 24".

It is contended, however, that if the mortgagee can, without a trespass, enter he may take qualified possession subject only to the lien of attachment. The right of the mortgagee to enter the premises and secure a lien by the presence of his keeper was not defeated by the presence of the sheriff's keeper.

Fettyplace v. *Dutch*, 13 Pickering, 388.
Grant v. *Lyman*, 4 Metcalf, 470.
Arnold v. *Brown*, 24 Pickering, 89.
Smith v. *Condon*, 174 Mass. 550.
Thompson v. *Fairbanks*, 196 U. S. 516.
Mann v. *Huston*, 1 Gray, 250.

In the holding of the two keepers there was a "qualified" control in the mortgagee's keeper, and when the sheriff's keeper was removed, the mortgagee's keeper held full control of the entire property.

Fettyplace v. *Dutch*, 13 Pickering, 388.

The status of a sheriff's keeper on premises where the attached property is found is not a very permanent or secure one. The property "may be kept upon the premises where it is found unless the owner or occupant of the premises in writing requests the officer to remove his keeper therefrom". Massachusetts Revised Laws, Chapter 167, Section 44.

The mortgagee's keeper had an actual right on the premises under the assigned lease, besides his right under the mortgage, equal to the right of the sheriff's keeper. The possession of the sheriff's keeper rested upon his presence simply, and the mortgagee's keeper was likewise present. As a matter of fact, distinguished from law, one had as much actual possession as the other.

6. The Attachment Not Preserved for the Benefit of the Bankrupt Estate.

The attachment does not inure to the benefit of the trustee. It was wholly discharged by failure of the trustee to preserve the attachment for the benefit of the estate.

Thompson v. *Fairbanks*, 196 U. S. 516.
Davis v. *Crompton*, 158 Federal Reporter, 735.
Zartman v. *First National Bank*, 216 U. S. 134.

Bankruptcy Act, Section 67:—

d. "Liens given or accepted in good faith and not in contemplation of or in fraud upon this Act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this Act."

f. "That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be

deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: Provided, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

7. SUMMARY.

The appellant contends that, as attached goods may be mortgaged by a mortgage duly recorded, there is no reason that they could not be as well mortgaged by an unrecorded instrument if the mortgagee does all that is reasonable and possible to take possession after the attachment. As between sales and unrecorded mortgages, there is no difference in the degree of possession required to give validity. It cannot be contended that the only valid mortgage of attached chattels that can be given is a recorded mortgage.

The provisions of the bankruptcy act should not be used to supplant the appellant's lien with one of no greater merit.

Thompson v. *Fairbanks*, 196 U.S. 516.

The sequence of events in *Thompson* v. *Fairbanks* was as follows:—

April 15, 1891. Date of mortgage.
May 7, 1900. Attachment by sheriff.
May 16, 1900. Mortgagee took possession.
June 11, 1900. Mortgaged goods sold.
June 30, 1900. Bankruptcy petition filed.

In the case at bar the sequence of events is substantially the same. In the case cited the mortgage was originally recorded, but practically all the property in issue was after acquired property, and by the laws of Vermont possession of after acquired property must be taken to make the mortgage valid. So that the fundamental question, to wit, the right of a mortgagee to take possession while a sheriff has possession under attachment, is the same.

The same reasons which led the court to sustain the mortgagee's contentions against the trustee in the case cited, apply in the case at bar.

In the case at bar we have:—

March 2, 1909. Date of mortgage.
May 24, 1909. Attachment.
May 24, 1909. Mortgagee took possession.
May 26, 1909. Bankruptcy petition filed.

Respectfully submitted,

JAMES H. DUFFY,
Appellant.

FILED
JAN 2 1915
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 120.

JAMES H. DUFFY, APPELLANT,

v.

WILLIAM CHARAK, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF JULES & FREDERIC COMPANY.

BRIEF OF WILLIAM CHARAK,

TRUSTEE, APPELLEE.

WILLIAM CHARAK, *Trustee,*
Appellee, pro se.

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WILLIAM CHARAK, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF JULES & FREDERIC COMPANY.

BRIEF OF WILLIAM CHARAK, TRUSTEE, APPELLEE.

I.

STATEMENT OF THE CASE.

This is an appeal from a decree of the Circuit Court of Appeals for the First Circuit, affirming a decree of the United States District Court for the District of Massachusetts, affirming an order of the referee in bankruptcy proceedings declaring invalid a mortgage given by the bankrupt to the appellant, and requiring the surrender to the appellee of all money and property belonging to the bankrupt's estate now in possession of the appellant.

The mortgage was dated March 2, 1909, was written in the sum of $5,675, and was not recorded as required under the Massachusetts statute. *Revised Laws of Mass., Chap. 198, Section 1.*

The appellant, in place of recording the mortgage, claimed to have taken and retained possession under the provisions of the statute above referred to.

The bankrupt's business remained open to the public from March 2, 1909, to May 24th following, without ostensible change in the matter of management, control or ownership. In the meanwhile goods were being bought by the bankrupt on credit, and a large part of the bankrupt's indebtedness is for goods bought on credit after the date of the alleged mortgage to the appellant. On the last-mentioned date the goods claimed to be mortgaged were attached by a deputy sheriff in a suit against the bankrupt. A keeper was placed over these goods, and the store was then closed. Thereupon the appellant asserted his mortgage by notifying the deputy sheriff thereof, putting in a keeper of his own in addition to that of the sheriff's, and the two keepers remained in possession until after the filing of the creditors' petition in bankruptcy against the bankrupt two days later, under which there was an adjudication.

On the creditors' petition, including the attaching creditor, the United States District Court enjoined the appellant from disposing of any of the property belonging to the estate until the further order of the Court. Thereafter, under a stipulation between all parties interested, the injunction was dissolved and the goods claimed under the mortgage were sold, and the proceeds are held under such stipulation.

The appellee was in due course appointed trustee of the bankrupt's estate, and brought his petition to declare the appellant's mortgage invalid, and for the surrender of the proceeds of the property sold under the stipulation above referred to.

After a hearing on the merits, the appellant admitted that as to the amount of $4,175 the mortgage was void-

able as a preference, and thereupon waived his rights under the mortgage to that extent, and claimed his mortgage valid only as to $1,500.

The referee's order and the decree of the District Court declaring the appellant's mortgage invalid are based upon findings of fact recited in their respective certificate (Record, pp. 6–8) and opinion (Record, pp. 10–13), and for the purpose of shortening the record the parties agreed that, together with other agreed facts (Record, pp. 13, 14), the findings of fact disclosed by the certificate of the referee and by the opinion of the District Judge shall be deemed to be the facts which the evidence, if reported, would disclose so far as they may be material in this case.

II.

ARGUMENT.

On Assignment of Errors.

The assignment of errors relied on by the appellant upon his claim of an appeal to the Supreme Court of the United States sets out eight different grounds. Some of the grounds thus relied on by the appellant are not set out or argued in the appellant's brief, and thus might be treated as waived.

Iasigi v. *Shea*, 148 Mass. 538.

On a general finding on all the issues of fact no error can be assigned.

Meath v. *Board of Mississippi Levee, etc.*, 109 U. S. 268.

The appellee, however, not being able to anticipate the action of the Court in the premises, will discuss

the several grounds relied on by the appellant in their order as they appear upon the record (pp. 19, 20).

(1) *In affirming the order and decree of the District Court.*

The District Judge and referee each arrived at the same conclusion upon findings of facts warranted by the evidence and agreed to by the appellant.

> "The settled rule is that the concurrent action of two courts upon questions of fact will not be disturbed except in a case of manifest error."
>
> *First National Bank* v. *Littlefield*, 226 U. S. 110.

It does not appear that there was "manifest error" in affirming the order of the referee and the decree of the District Court.

(2) *In not ruling that said respondent's mortgage was valid to the amount of $1,500.*

Section 1 of *Chapter 198 of the Revised Laws of Massachusetts*, after providing for recording of chattel mortgages within a limited time, further provides that "unless the property mortgaged has been delivered to and retained by the mortgagee, the mortgage shall not be valid against a person other than the parties thereto." This statutory provision fully disposes of the contention. Under the findings of fact by the referee and District Judge, by which the parties are bound, the property claimed under the mortgage was never "delivered to and retained by the mortgagee," thus invalidating the

mortgage as to all persons other than the mortgagor and the mortgagee.

Wright v. *Tetlow*, 99 Mass. 397.
Porter v. *Stuart*, 203 Mass. 46.

Clearly if, by operation of law, the mortgage was not valid in its entirety, it cannot be declared valid as to a part of it.

(3) *In not ruling and finding that the respondent had a sufficient and valid possession under his mortgage when the bankruptcy petition against Jules & Frederic Company was filed.*

If, as was argued in reply to the second assignment of error, the finding of fact that the appellant did not have possession prior to May 24, 1909, is binding upon the appellant, then the mortgage was invalid on that date for want of record, and mere taking possession by virtue of such an invalid mortgage on or subsequent to that date could not possibly avail the appellant. The statute requires a "delivery" of the mortgaged goods to as well as a retention by the mortgagee. The appellant has not shown nor does the record disclose a "delivery" of possession other than that alleged as of March 2, 1909, described by the referee and District Judge as "merely colorable," and "not *bona fides*," and such as "would tend to enable parties to practice the very fraud which the statute as to unrecorded mortgages of personal property was intended to prevent."

Moors v. *Reading*, 167 Mass. 322, 326.

(4) *In not ruling that the respondent had sufficient and valid possession under his mortgage as against everyone except the attaching creditor referred to in the records.*

If the Court had thus ruled, and the appellant adopted such ruling, there would be an admission by him that, at least as to an attaching creditor, his mortgage was not valid.

There is no particular reason why a mortgage, invalid as to an attaching creditor, might or could be valid as to other creditors who resort to bankruptcy proceedings. If the mortgage could have been lawfully defeated by an attaching creditor for want of record or possession, it can and ought to be so defeated in bankruptcy proceedings as now pending.

Moors v. *Reading*, 167 Mass. 322.
Clark v. *Williams*, 190 Mass. 219.
Dempsey v. *Gardner*, 127 Mass. 381.
Davis v. *Schwartz*, 155 U. S. 631.

(5) *In not ruling and finding that the attachment of May 24, 1909, was dissolved by the bankruptcy proceedings, leaving the mortgage lien valid to the amount of $1,500.*

The bankruptcy proceedings dissolved the attachment, and the attachment was further dissolved by the deputy sheriff withdrawing his keeper after the filing of the creditor's petition (Record, p. 12, par. 8), but neither of these facts could avail the appellant to create a mortgage lien for any amount without having a valid mortgage wherewith to enforce it. The mort-

gage was invalid for want of recording and for want of delivery and possession.

Bankruptcy Act, Section 67 (c) and (f).

(6) *In not ruling and finding that the lien of attachment of May 24, 1909, was not preserved for the benefit of the bankrupt estate of Jules & Frederic Company.*

The attachment need not have been specifically preserved. The claim of the trustee is transferred to the proceeds, which ordinarily must be presumed to represent the fair value of the goods, and take their place.

Jones v. *Springer*, 226 U. S. 148, 157.

The court of bankruptcy is a court of equity, all the property of a bankrupt is trust property, and every proceeding in the District Court in the administration of it is a proceeding in the administration of a trust in equity.

The filing of the petition in bankruptcy, and the adjudication which followed it, embodied in themselves a commanding injunction of the Court against the interference of the defendant with and his concealment and removal from the trustee and the Court of any of the property of the bankrupt. Against the defendant, and against all others who had no valid lien upon the interest in that property at the time of the adjudication, the injunction and command of the Court against such interference and removal, and notice thereof to all the world, were embodied in the injunction and issued therewith by the settled law of the land.

Clay v. *Waters*, 178 Fed. Rep. 385, 394.

It is the established doctrine that bankruptcy proceedings are *in rem*, and, when commenced, all of the property then held by the bankrupt, or for his use, (aside from exemptions) is subjected to the jurisdiction of the bankruptcy court, and that, when bankruptcy is adjudicated, the sequestration reaches all such property at least, and becomes operative from the institution of proceedings, as "a *caveat emptor* to all the world," preventing interference by attachments or other means in derogation of the interests of the estate.

> *State Bank of Chicago* v. *Cox*, 143 Fed. Rep. 91, 93.

The jurisdiction of the bankruptcy court is absolute, paramount and exclusive to adjudicate the question of bankruptcy, to settle and liquidate the estate of the bankrupt, and as to all matters and questions arising in bankruptcy proceedings touching the persons and property of the bankrupt's, their relations to their creditors, and the rights of creditors in and to the bankrupt's estate, from the commencement of the proceedings to their close.

> *Cruchet* v. *Red Rover Mining Co.*, 155 Fed. Rep. 486.

(7) *That, whereas, the said attachment of May 24, 1909, was dissolved by the filing of the bankruptcy petition against the Jules & Frederic Company, the said court should have found the respondent's mortgage lien then became valid to the extent of fifteen hundred dollars.*

This assignment of error is a paraphrase of the fifth assignment and, without repeating it, the reply made there applies to this with equal force.

Such a ruling could not have been made in view of the finding of fact that there was no delivery to and possession by the mortgagee, and in view of the necessary conclusion that the mortgage was invalid for want of recording, or of such delivery and possession as the statute contemplates in place of such recording.

Porter v. *Stuart, supra.*

By the effect of the bankruptcy the rights of the parties became fixed.

Merchants National Bank v. *Sexton*, 228 U. S. 634, 643.

(8) *In not ruling that the possession of the mortgaged goods taken by the respondent on May 24, 1909, was a valid possession as against the trustee in bankruptcy of the Jules & Frederic Company.*

Such a ruling, if made, would be directly opposed to the finding of fact that the appellant had no valid possession prior to May 24th.

III.

On Appellant's Citations.

The case of *Thompson* v. *Fairbanks*, 196 U. S. 516, relied on and frequently cited by the appellant is not in point. There the mortgage was recorded and the validity of the lien was not in dispute, the only point in dispute there was, the validity of possession so far as it applied to after-acquired property. That case cannot, by any stretch of the imagination, be made to apply to the case at bar, where the validity of the mortgage

itself is attacked, and its invalidity as to its major part is conceded by the appellant.

The case of *Tatman* v. *Humphrey*, 184 Mass. 361, and (S. C.) *Humphrey* v. *Tatman*, 198 U. S. 91, relied on by the appellant differs from the case at bar. There the mortgagor delivered and the mortgagee retained possession of the mortgaged property some three weeks before the bankruptcy proceedings were instituted, and before third persons had acquired a lien or rights, by attachment or otherwise, which gave the mortgagee a title which was good at common law against creditors. In the case at bar there is a finding of fact that there never was any delivery or possession as contemplated by the statute, and that the deputy sheriff's possession, while it lasted, was exclusive, and continued until the filing of the petition in bankruptcy, under which there was an adjudication.

The case of *Davis* v. *Compton*, 158 Fed. Rep. 735, relied on by the appellant, affirms the rule that a trustee in bankruptcy is subrogated to a claimant's rights who claims by a superior title. In the case at bar the mere holding of an unrecorded mortgage did not create a superior title, nor, in fact, any title whatsoever, after the attachment gave way to the superior rights and powers of the bankruptcy court.

Clay v. *Waters*, 178 Fed. Rep. 385.

Respectfully submitted,

WILLIAM CHARAK, *Trustee*,

Appellee, pro se.